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No. 86-716

IN THE

# Supreme Court Of The United States

October Term, 1986

RANDOLPH COUNTY,
*Petitioner,*

v.

ALABAMA POWER COMPANY,
*Respondent.*

Petition For a Writ of Certiorari to The United States Court of Appeals For the Eleventh Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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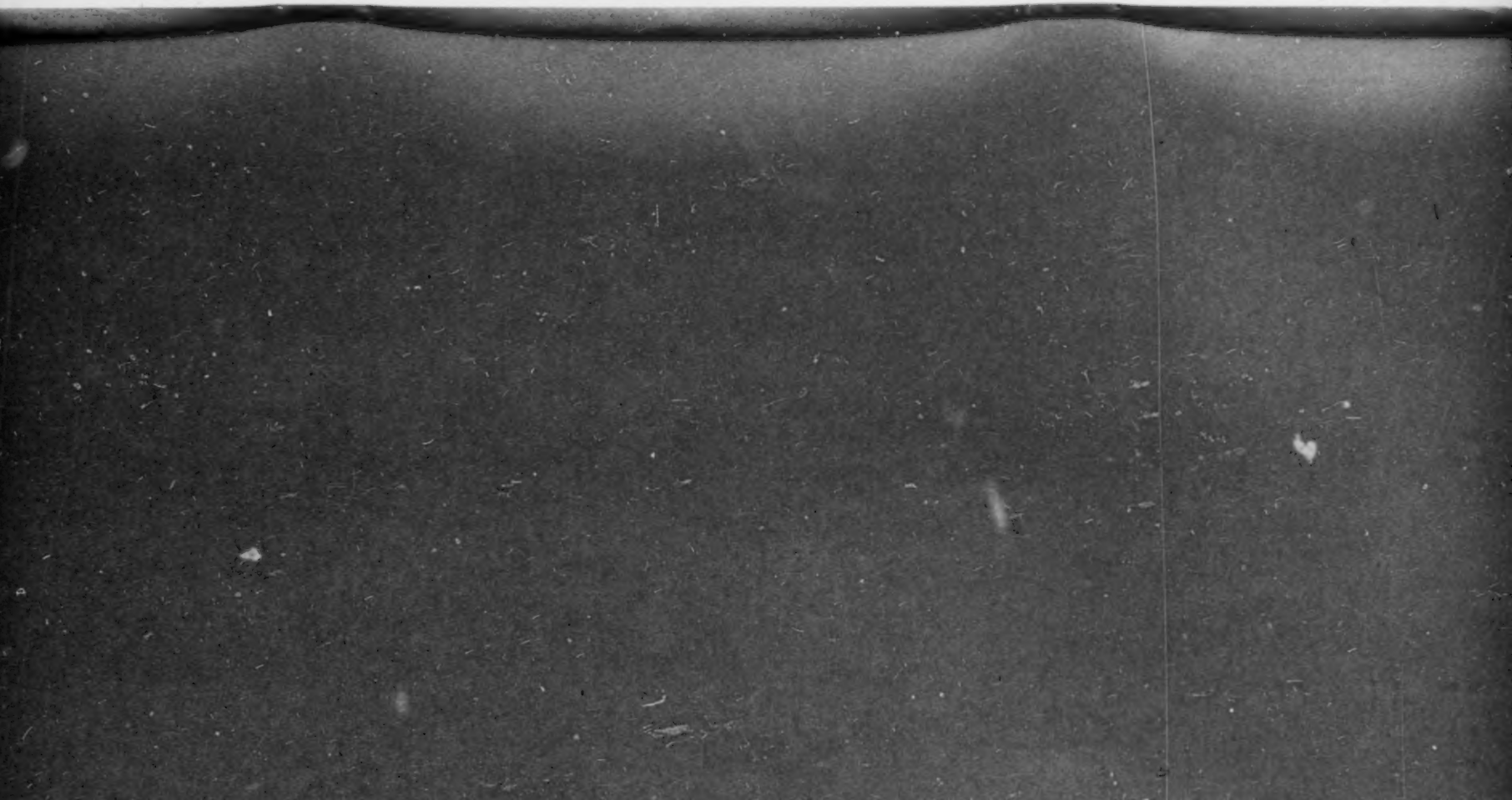

## QUESTIONS PRESENTED

1. Does the Petitioner misstate the facts so as to give the appearance of presenting a federal question when there is none?

2. Does the Eleventh Circuit's decision that Randolph County, a political subdivision of the State of Alabama, cannot assert a cause of action under 42 U.S.C. § 1983 against Alabama Power Company conflict with decisions of other Circuit Courts or this Court?

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## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Alabama Power Company,[1] respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 784 F.2d 1067 (1986). The memorandum

[1]As required by Rule 28.1 of this Court, a listing of all parent companies, subsidiaries, and affiliates of respondent Alabama Power Company follows: The Southern Company, a registered public utility holding company, is the parent company of and holds all the common stock in Alabama Power Company. Other subsidiaries of The Southern Company are Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc., and Southern Electric International, Inc. Alabama Power Company owns a 50% interest in Southern Electric Generating Company.

opinion of the United States District Court for the Middle District of Alabama (Thompson, J.) has not been reported. It is reprinted in Appendix H hereto.

## STATEMENT OF THE CASE

This case arises out of the construction of the R. L. Harris Dam and Reservoir by Alabama Power Company (APCo) and the subsequent flooding of certain roads and bridges in Randolph County, Alabama. As a water power company, APCo is permitted by Alabama's Water Power Company Act to flood Randolph County's roads and bridges "by first paying to the court of county commissioners the costs of locating, laying out and opening other public roads and bridges in lieu of and to the same extent as the public roads flooded or intended to be flooded." *Ala. Code* Tit. 10 § 180 (1940) [Now *Ala. Code* § 10-4-320(5) (1975)[2]] (Appendix A). In 1969, and again in 1974, the Court of County Commissioners of Randolph County computed these costs and issued orders directing APCo to pay over $1 million before any flooding could occur. Appendices B, C, D, and E. APCo did so, never having invoked any state or federal law pertaining to eminent domain.

In its petition, however, Randolph County has misstated these facts. It says that APCo, pursuant to § 814 of the Federal Power Act, 16 U.S.C. § 791, *et seq.*, "elected to condemn the subject property under the provisions of the state law of Alabama." Petition for Writ of Certiorari at 6. Randolph County adds that its claim against APCo under 42 U.S.C. § 1983 is for "a gross abuse of the power to condemn delegated to private corporations by the state legislature." Petition for Writ of Certiorari at 15. Because the petition is based on an inaccurate factual predicate, respondent in this statement of the case will give a thorough and correct recitation of the facts.[3]

[2]The 1975 recodification of this Act changes "court of county commissioners" to "county commission" to recognize the adoption of a different form of government. In all other respects the Act remained the same.

[3]Respondent is painfully aware that correcting the petitioner's statement of the case is a substantial task. It must be done, however, because it

The truth is that no eminent domain proceeding was ever conducted, since APCo did not file one and state law – the Water Power Company Act – did not require one. *Ala. Code* Tit. 10 § 180, *et seq.* (1940) (Appendix A). Originally, Randolph County attempted to impose upon APCo this eminent domain obligation, but the District Court ruled in APCo's favor and no appeal was ever taken from this judgment. Appendices F, H. One of the claims the County made in its original complaint was that state condemnation proceedings *should* have been followed by APCo. Appendix F. Upon proper motion by APCo on January 22, 1983, the District Court rendered summary judgment on this claim. It held:

> The county's theory that APCo failed to comply with procedures for condemnation is also without merit. § 10-4-320 (5), Code of Alabama 1975, [the successor to Tit. 10 § 180] provides in pertinent part that entities such as APCo "shall have the right to flood public roads by paying to the county commissions of counties in which public roads are the cost of locating, laying out and opening other public roads in lieu of and to the extent as the public roads flooded or intended to be flooded." *The county's contention that APCo was required to go through a "condemnation" procedure is not supported from the face of the statute. The statute does not condition APCo's right to flood already public roads on prior condemnation of those public roads by APCo. Therefore APCo's motion for summary judgment is due to be granted on this theory.*

Appendix H, p. 34 (Emphasis added).

The facts supporting this holding have never been in dispute. In 1969, pursuant to the Water Power Company Act, APCo petitioned the Court of County Commissioners of Randolph County asking that "in accordance with the provision of *Alabama Code* 1940, Title 10, Section 180, [it] ascertain the amount that the petitioner will be required to pay under the

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dramatizes the lack of basis for this Court's jurisdiction, the lack of conflicting Circuit Court decisions, the lack of a conflict with this Court's opinions, and the lack of the petitioner's ability to fool the Circuit Court with its fanciful recitation of what never happened.

terms of such statute . . . and for such other orders as may be proper." Appendix B.

Acting pursuant to state law, the Court of County Commissioners convened, reviewed the petition, and "the same having been fully considered and understood," ordered APCo to pay $781,015.24 to Randolph County as "the amount that petitioner shall pay under the terms of *Alabama Code* Title 10, Section 180 for the existing and proposed roads, bridges and ferries flooded or intended to be flooded." Appendix C.

In 1974, because of a reservoir elevation change from 793 msl to 795 msl, and because "costs have increased since 1969 with regard to remedial work necessary to be performed by the county," APCo again petitioned the Court of County Commissioners to fix the costs to be paid by it to Randolph County. Appendix D. The Court of County Commissioners did so, and after such consideration that seemed good to them, they increased the amount of compensation to $1,056,015.24 and established a payment schedule on which APCo honored. Appendix E.

On August 5, 1981, Randolph County (ignoring its role as the sovereign with plenary power to set the amount to be paid) filed its complaint, which it later amended, claiming that APCo violated its federal due process rights when it used state action to condemn property without paying just compensation. Appendices F, G. Not bothering to remind Randolph County that it, not APCo, acted as the state in this transaction, and having already ruled that no condemnation action was necessary, the District Court nonetheless followed well-established federal case law and granted APCo's summary judgment motion on this claim. It reasoned that even if it assumed that APCo's action under the Water Power Company Act were the action of the State of Alabama for purposes of 42 U.S.C. § 1983, "the issue then becomes whether the County has any federally protected right against state action that takes public property without paying compensation . . ." Appendix I, p. 39. Federal case law on this point was clear and without conflict: Political subdivisions of a state have no federal due process rights which

they can assert against their creator. Thus summary judgment on this claim was granted. Appendices I, J.

The Eleventh Circuit, in affirming the trial court's holding, put the parties in their proper position:

> The Court of County Commissioners was to determine the appropriate compensation and APCo could either pay or appeal. *See* Ala. Code § 10-4-320(5) (1975) on the rights and authority of water power companies.
>
> * * * *
>
> The county in this litigation pretty much disregards this form, but that is no reason why we should do so. The Commissioners wielded the sovereign power . . . They were the government. APCo was the suppliant.

*Randolph County v. Alabama Power Co.*, 784 F.2d 1067, 1071 (11th Cir. 1986).

Notwithstanding this clear articulation of the proper role of the parties, Randolph County filed a "Second Petition for Rehearing" in the Eleventh Circuit, raising for the first time its principle of "dominant sovereign authority" and the harmonious nature of this principle with the County's § 1983 claim. The Eleventh Circuit denied this "Second Petition for Rehearing," and this petition followed.

To support this petition Randolph County has made unsupportable factual statements, ignored state law, and failed to apprise this Court of relevant adverse rulings below from which it did not appeal. The respondent asks that this Court review the decisions of the lower courts to determine if it is the petitioner, or the respondent, who is accurately stating the facts. If it is the respondent the petition should be denied, since Randolph County is then merely seeking a writ of certiorari to change the facts — which cannot be done.

But even if this Court concludes that APCo exercised some state power of eminent domain, or even if it does as the District Court and Circuit Court have done — which is to *assume* this to be so — there still remains no conflicting federal decision or unsettled federal question which would justify granting this petition.

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. Neither The Decision Below Nor The Record Supports The Factual Assertions Contained In The Petition.

In the Statement of the Case in its petition, Randolph County has told this Court that it was denied just compensation for the flooding of its roads and bridges when APCo "elected to condemn the subject property under the provisions of the state law of Alabama." Petition for Writ of Certiorari at 6. Seeking reversal of two adverse rulings below, Randolph County then describes its claim against APCo as one arising out of a "gross abuse of the power to condemn delegated to private corporations by the State Legislature." Petition for Writ of Certiorari at 15. The argument that follows this factual assertion — that Randolph County has federal rights in its property and that these rights must be protected from a public utility utilizing eminent domain procedures — all are predicated on the implication that there was an eminent domain proceeding in which just compensation was denied Randolph County. If, however, there was no such proceeding, the foundation for the petition fails, and the petition is exposed for what it actually is — a blatant attempt to get this Court to grant certiorari to change facts.

There was no eminent domain proceeding. A review of the Water Power Company Act, the orders of the Court of County Commissioners of Randolph County in 1969 and 1974, and the opinions below — particularly the District Court's opinion set out in Appendix H — makes clear that petitioner has no factual foundation for its representation to this Court that an eminent domain proceeding occurred.

The Water Power Company Act has no such requirement. That statute says that companies such as APCo "shall have the right to flood public roads" by paying to the Court of County Commissioners "the cost of locating, laying out, and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded." *Ala. Code*

Tit. 10 § 180 (1940). Nothing in the Act contemplates a condemnation proceeding; in fact, it is the County, not APCo, that initially sets the amount to be paid. Once this order issues from the Court of County Commissioners, APCo — as a water power company — either must pay or appeal "within 30 days after the making of such order . . . and on such appeal the trial shall be *de novo*." *Ala. Code* Tit. 10 § 180 (1940).

This was the procedure used by APCo in 1969 and 1974 and it clearly demonstrates two things: (1) No condemnation proceeding was held, and (2) *Randolph County, not APCo, fixed the amount of its own compensation.*

Appendices B, C, D, and E to this brief contain the petitions filed by APCo and the orders entered by the Court of County Commissioners of Randolph County. That these proceedings did not constitute an eminent domain "taking" by APCo is evident from the documents. If there had been a condemnation proceeding, then it would have proceeded under Alabama eminent domain law, codified in *Alabama Code* § 18-1-1 *et seq.* (1975). Eminent domain condemnation proceedings require that an application for condemnation be filed in probate court, a valuation hearing be held, and, if necessary, a trial by jury. Alabama Power Company was afforded none of those safeguards here.

In its petition, Randolph County offers no support for its bold assertion that APCo committed "state action" by utilizing state eminent domain procedures. In a blatant attempt to disregard the form of what actually transpired, the County rests its entire argument on an event that never occurred. In its opinion, the Eleventh Circuit saw the relationship accurately:

> We note that under the Alabama practice the County Commissioners constituted themselves a "Commissioner's Court," though not a court of record. After such consideration as seemed good to them, they entered an order in 1969, and a modification of it in 1974, setting the awards the county was to receive, each of them being in form unilateral orders or decrees, not bilateral contracts. The county in this litigation pretty much disregards this form,

> but that is no reason why we should do so. *The Commissioners wielded the sovereign power . . . They were the government. APCo was the suppliant.*

784 F.2d at 1071 (Emphasis added).

Where then is the factual underpinning for the petitioner's contention that APCo acted as the state and Randolph County was the victim? Where then is the use by APCo of the eminent domain statute of the State of Alabama? Where then is the "gross abuse of the power to condemn?" Randolph County can point to no such proceeding in either the record or the decision below. The only correct answer is that these facts do not exist, except in the statement of the case of the petitioner.

Because of the failure of the petitioner to base its legal argument on facts in the record and the opinion below, the respondent respectfully requests that the petition be denied.

## 2. The Eleventh Circuit's Decision That, As A Political Subdivision Of The State Of Alabama, Randolph County Cannot Assert A Cause Of Action Against APCo, Does Not Conflict With Decisions Of Other Federal Courts, Nor Does It Present An Unsettled Federal Question.

A. *This Court and other Circuit Courts unanimously declare that a County has no Fourteenth Amendment rights.*

While not exclusively defining *certiorari* review discretion, Supreme Court Rule 17.1, subsections (a) and (c), identify the major bases applicable here upon which this petition may be granted.[4] Randolph County offers no reason identified in

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[4]In part, Rule 17 says that a review on writ of certiorari is discretionary "and will be granted only when there are special and important reasons therefor." The two relevant reasons here are:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

this Rule as supporting its petition – preferring instead to rely on Alabama precedent to support the contention that counties possess federal due process rights. Federal circuit courts, however, unequivocally hold that states and their subdivision do not possess these rights. *See, e.g., South Macomb Disposal Authority v. Township of Washington,* 790 F.2d 500, 506 (6th Cir. 1986); *Delta Special School District v. Arkansas Board of Education,* 745 F.2d 532, 533 (8th Cir. 1984); *City of Moore v. Atchison, Topeka, & Santa Fe Railroad,* 699 F.2d 507, 511-12 (10th Cir. 1983); *Village of Arlington Heights v. Regional Transportation Authority,* 653 F.2d 1149, 1151-53 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe,* 625 F.2d 231 (9th Cir.), *cert. denied* 449 U.S. 1039 (1980); *Appling County v. Municipal Electric Authority,* 621 F.2d 1301 (5th Cir.), *cert. denied,* 449 U.S. 1015 (1980); *Allegheny County Sanitary Authority v. United States Environmental Protection Agency,* 732 F.2d 1167, 1173 n. 2 (3d Cir. 1984); *City of New York v. Richardson,* 473 F.2d 923, 929 (2d Cir.), *cert. denied,* 412 U.S. 950 (1973); *City of Sault Ste Marie, Michigan v. Andrus,* 532 F. Supp. 157, 167 (D.D.C. 1980); *Lewis v. Richardson,* 428 F. Supp. 1164, 1167 (D. Mass. 1977).

One case specifically relied upon by the Eleventh Circuit in its opinion clearly expresses the unanimous rationale of these decisions. *City of Safety Harbor v. Birchfield,* 529 F.2d 1251 (5th Cir. 1976), held that a municipal corporation could not bring a § 1983 suit. It said:

> Ever since the Supreme Court's landmark decision in *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporation or individuals. 17 U.S. (4 Wheat.) at 660-61, 4 L.Ed. at 664. Such entities are creatures of the

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

> state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state. *** In contrast to private individuals and entities, municipal corporations have repeatedly been denied the right to challenge state legislation allegedly violative of the Federal Constitution.

529 F.2d at 1254; *accord, Appling County v. Municipal Electric Authority,* 621 F.2d 1301 (5th Cir.), *cert. denied,* 449 U.S. 1015 (1980).

The Eleventh Circuit's decision likewise accords with a uniform line of decisions by this Court. *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), in rejecting a Fourteenth Amendment challenge by a municipality to its consolidation with another, made clear the position of political subdivisions:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.

207 U.S. at 178-79; *accord, Trenton v. New Jersey,* 262 U.S. 182 (1923); *see Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36 (1933).[5]

Randolph County contends, however, that there is a constitutional exception to this principle. It says that the case of

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[5]Under Alabama law, counties, like municipal corporations, are merely subordinate departments of the state and receive their authority from the state constitution and the plenary power of the legislature. Alexander v. State ex rel. Carver, 150 So.2d 204 (Ala. 1963); Pritchard v. Alabama Power Co., 175 So.2d 294 (Ala. 1937).

*Gomillion v. Lightfoot,* 364 U.S. 339 (1960), allows it to proceed even if its claim "were in direct conflict with the will of the State of Alabama." Petition for Writ of Certiorari at 20.

Not surprisingly, Randolph County's reference to *Gomillion v. Lightfoot* grossly distorts that decision. The County quotes language out of context in support of the contention that *Gomillion* creates an exception to *Hunter, City of Trenton,* and *Williams.* Petition for Writ of Certiorari at 19-20. *Gomillion* creates no such exception; rather, after reaffirming that municipalities possess no *Fourteenth* Amendment rights, this Court in *Gomillion* recognized some narrow circumstances in which municipalities may act to vindicate the *Fifteenth* Amendment rights of their residents. 336 U.S. at 343-344.

Unlike the County's discussion of this case, an accurate reading demonstrates that *Gomillion* nowhere suggests that *Williams* and *City of Trenton* no longer apply to situations in which a state subdivision sues its creator (or an entity acting with its creator's authority), even when it alleges that its lawsuit is "in harmony with" the "will" of the state. To the contrary, *Gomillion* reaffirms the clear declaration of this Court in *Williams* and *City of Trenton,* that political subdivisions never have *Fourteenth* Amendment rights regardless of whether they seek to oppose or "harmonize" their claim with that of their state creator. 336 U.S. at 343-344. Because the Eleventh Circuit, like every other circuit that has faced the question, dutifully followed the dictates of *Williams* and *City of Trenton,* the Eleventh Circuit acted *consistently with* this Court's decisions.

Because there is no conflict among these decisions in any forum of the federal judiciary, and because if this Court considered the merits of the case it would be asked to revisit and reverse its own well-established precedent, respondent submits that the petition should be denied.

B. *There Is No Unsettled Federal Question Presented Here.*

Randolph County has inartfully suggested that an unsettled federal question of first impression is presented here by claim-

ing that its § 1983 claim actually promotes the will of the State of Alabama by being in "harmony" with the State's objectives. This is not only logically impossible but borders on being preposterous. As respondent has noted previously, because counties do not have Fourteenth Amendment rights there can be nothing unsettled about whether there exists an exception to this rule when the county brings the action "in harmony with" the will of the State.

Moreover, such an exception, if it existed at all, would be a *non sequitur*. In order to maintain a § 1983 action based upon a Fourteenth Amendment violation, the County must establish that Alabama Power Company, while acting under Alabama's Water Power Company Act, committed "state action." *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1983); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). That is, in order to prevail on the merits of its constitutional claim, Randolph County must show that Alabama Power Company acted for the state in making its petition to the Court of County Commissioners under *Alabama Code* Title 10 § 180 (1940). The County's claim can only set forth a cause of action, therefore, if Alabama Power Company acted as an instrument of the State of Alabama in contravention of Randolph County's federal rights.

Logically, it is impossible for this to occur. It is impossible for Randolph County's claim to be in *harmony* with the will of the State of Alabama when that claim requires proof that the defendant, acting for the State, committed the wrongful act. Logically, any Fourteenth Amendment claim by a political subdivision of the State, by definition, can only be contrary to the will of its creator.[6]

[6]What is more logical is that APCo complied with the will of the State of Alabama when it petitioned the Court of County Commissioners and when it paid the sums ordered. Likewise, acting as the sovereign in this matter, the County complied with the will of the State when it set the costs of relocating the flooded roads and bridges. The point of absurdity comes when Randolph County, the sovereign, sues APCo, the private suppliant, alleging a wrongful use of state power to violate the sovereign's federal property rights.

Randolph County's contention requires this Court to accept an absurd role reversal, whereby the private entity, in petitioning the sovereign, becomes the sovereign, while the sovereign, when petitioned by the private entity, is treated as the owner of private property.

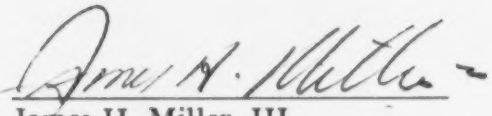
Nothing of this sort was contemplated by the framers of the Constitution, and nothing of this sort was contemplated by the Alabama Legislature. The requirement of § 1983 that the defendant commit State action means that it act in accordance with the will of the State. Randolph County's attempt to make APCo a state actor for purposes of federal jurisdiction under § 1983, but not for purposes of creating a dispute between a political subdivision and its creator, is self-defeating. If this Court assumes that APCo acted as the State of Alabama by petitioning the Court of County Commissioners of Randolph County, then its status brought with it the power of "a sovereign state [to] transfer its own public property from one governmental use to another [and] a like obligation does not arise to pay just compensation for it." *United States v. Carmack*, 329 U.S. 230, 242 n.12 (1946). Thus, even under that assumption the County has no room to complain about the result; it naturally follows that it cannot prosecute a § 1983 claim.

What is apparent is that Randolph County wishes to shirk its role as the sovereign and seeks to place this burden on APCo. While illogical and incomprehensible, even if this Court assumes that it can be done there still remains no important unsettled federal question that under Rule 17 would justify this Court's exercise of its *certiorari* jurisdiction.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served upon all counsel of record to this proceeding by depositing a copy of same in the United States Mail, first class postage prepaid and properly addressed this 24 day of November, 1986.

OF COUNSEL

# APPENDICES

# APPENDIX A

## Code of Alabama, Title 10, Section 180 (1940)

*Right to flood roads.* — Such corporations shall have the right and authority to acquire by condemnation the right to flood private roads, and shall have the right to flood public roads by paying to the court of county commissioners or board of revenue of counties in which public roads are, the cost of locating, laying out, and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded; but such corporation may appeal from the order of the court of county commissioners to the circuit court of the county within thirty days after the making of such order, by filing with the judge of probate of the county a written notice of appeal, and on such appeal the trial shall be de novo. Upon the payment of such corporation to the court of county commissioners of the sum fixed by such court, together with the costs of the proceeding, pending such appeal, and upon the execution of a bond in double the amount of such damages or amount so fixed, with good and sufficient sureties to pay such damages as the county may sustain, the corporation shall be entitled to flood the roads which are made the object of the proceeding; but such right shall not vest absolutely in such corporation until the final determination of the case and the payment or deposit in court of such damages or compensation as shall be adjudged.

## APPENDIX B

### Petition of May 29, 1969 to the Court of County Commissioners of Randolph County, Alabama

STATE OF ALABAMA )
)
RANDOLPH COUNTY )

TO THE COURT OF COUNTY COMMISSIONERS OF RANDOLPH COUNTY, ALABAMA:

Comes the petitioner, Alabama Power Company, and shows unto the Court as follows:

1. That it is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business at Birmingham, Jefferson County, Alabama; that it has by its charter the right to manufacture, supply and sell to the public power produced by water as a motive force; and that it has acquired by purchase and not by condemnation a dam site or power site comprising not less than one acre of land upon each and opposite sides of the Tallapoosa River, such dam site being located in Sections 28 and 29, Township 20 South, Range 10 East, Randolph County, Alabama, on the Tallapoosa River, at approximately river mile 132.8.

2. That the petitioner has applied to the Federal Power Commission for a license authorizing the construction of a dam across the Tallapoosa River at such dam site which will if constructed impound the waters of such river and back them up such river and its tributaries, such impounded waters to be used in connection with a proposed power plant and works connected with and useful thereto for the manufacture, supply and sale to the public of electric power produced by such impounded waters as a motive force in the manner required by law; that such waters if impounded will flood, injure or damage those portions of the public roads, bridges and ferries of such county that will be covered with, as well as those that will be entirely surrounded by, waters of the Tallapoosa River and

its tributaries when such waters are raised to an elevation of 793 feet, above mean sea level datum, as established by the United States Coast and Geodetic Survey, as revised in January, 1955, at the dam site (to wit, river mile 132.8).

PREMISES CONSIDERED, the petitioner prays that the Court of County Commissioners, in accordance with the provisions of Alabama Code 1940, Title 10, Section 180, will ascertain the amount that petitioner will be required to pay under the terms of such statute for public roads, bridges and ferries flooded or intended to be flooded, in the event the requested license to construct the proposed dam is issued by the Federal Power Commission and is thereafter accepted by petitioner, to the end that petitioner may pay to such Court the amount so ascertained, such amount to be paid at such times and in such installments as the Court may direct, and so that petitioner may thereby secure the right as provided by law so to flood, injure or damage such roads, bridges and ferries; and for such other orders as may be proper.

This the 29th day of May, 1969.

ALABAMA POWER COMPANY

By /s/ JOSEPH M. FARLEY

Its President

## APPENDIX C

### Order of June 3, 1969 by Court of County Commissioners, Randolph County, Alabama

| | | |
|---|---|---|
| STATE OF ALABAMA | ) | BEFORE THE COURT OF |
| | ) | COUNTY COMMISSIONERS |
| RANDOLPH COUNTY | ) | OF RANDOLPH COUNTY, ALABAMA |

IN THE MATTER OF THE PETITION OF ALABAMA POWER COMPANY TO FLOOD CERTAIN ROADS, BRIDGES AND FERRIES IN RANDOLPH COUNTY

The petition of Alabama Power Company, petitioner, in the above matter coming on to be heard by the Court of County Commissioners and the same having been fully considered and understood;

IT IS NOW, THEREFORE, RESOLVED, ORDERED AND ADJUDGED by the Court that the sum of $781,015.24 be and is hereby fixed by the Court as the amount that petitioner shall pay under the terms of Alabama Code 1940, Title 10, Section 180, for the existing and proposed public roads, bridges and ferries flooded or intended to be flooded by petitioner in Randolph County, as set forth in such petition and for such other damage as will be done to such county (in the event the requested license is issued by the Federal Power Commission and such license is thereafter accepted by Alabama Power Company and such dam is constructed); and

IT IS FURTHER RESOLVED, ORDERED AND ADJUDGED by the Court that in order to assure that timely locating, laying out, and opening of public roads and bridges and ferries in lieu of those flooded, the petitioner shall contemporaneously with the signing of this order, pay the sum of $100.00 to this Court to be used for public roads, bridges and ferries in Randolph County; that no later than thirty days after acceptance of a Federal Power Commission license by Alabama

Power Company providing for the construction of the proposed dam, petitioner shall pay the additional sum of $260,238.44 to this Court for such use; that not later than 30 days after actual physical construction work on the dam is started, petitioner shall make a payment of $260,338.40 to this Court for such use; and that not later than one year after the payment of $260,338.40, petitioner shall make a final payment of $260,338.40 to this Court for such use.

And Alabama Power Company now agreeing before the Court to pay such sums in such manner (in the event the proposed dam is built), it is further RESOLVED, ORDERED AND ADJUDGED by this Court that Alabama Power Company be and is hereby granted (in the event the proposed dam is built) the right and authority to flood, injure, damage or affect existing and proposed public roads, bridges and ferries in such county, as prayed for in such petition; and the Court here and now vests absolutely in Alabama Power Company (in the event the proposed dam is built) the right to flood, injure, damage or affect those portions of the existing and proposed public roads, bridges and ferries in such county that will be covered with, as well as those that will be entirely surrounded by, the waters of the Tallapoosa River and its tributaries when such waters are raised to an elevation of 793 feet above mean sea level datum, as established by the United States Coast and Geodetic Survey, as adjusted in January, 1955, at the dam site in Randolph County (to wit, river mile 132.8).

This the 3rd day of June, 1969.

/s/ STELL BENEFIELD

Judge of Probate and ex officio
Chairman of the Court of
County Commissioners

/s/ FRED MCCAIN

/s/ GAY FOSTER

/s/ GUY HENDERSON

/s/ TED WARD

Members of Court of
County Commissioners

## APPENDIX D

### Petition of July 18, 1974 to the Court of County Commissioners of Randolph County, Alabama

STATE OF ALABAMA )
RANDOLPH COUNTY )

TO THE COURT OF COUNTY COMMISSIONERS OF RANDOLPH COUNTY, ALABAMA:

Comes the petitioner, Alabama Power Company, and shows unto the Court as follows:

1. That it is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business at Birmingham, Jefferson County, Alabama; that it has by its charter the right to manufacture, supply and sell to the public power produced by water as a motive force; and that it has acquired by purchase and not by condemnation a dam site or power site comprising not less than one acre of land upon each and opposite sides of the Tallapoosa River, such dam site being located in Sections 28 and 29, Township 20 South, Range 10 East, Randolph County, Alabama, on the Tallapoosa River, at approximately river mile 138.

2. That the petitioner has applied for, been granted, and has accepted a license from the Federal Power Commission authorizing the construction by it of a dam across the Tallapoosa River at such dam site which will when constructed impound the waters of such river and back them up such river and its tributaries, such impounded waters to be used in connection with a proposed power plant and works connected with and useful thereto for the manufacture, supply and sale to the public of electric power produced by such impounded waters as a motive force in the manner required by law; that such waters if impounded will flood, injure or damage those portions of the public roads, bridges and ferries of such county that will be covered with, as well as those that will be entirely surrounded by, waters of the Tallapoosa River and its tribu-

taries when such waters are raised to an elevation of 795 feet, above mean sea level datum, as established by the United States Coast and Geodetic Survey, as revised in January, 1955, at the dam site (to-wit, approximately river mile 138).

3. That heretofore on May 29, 1969, petitioner filed with the Commission a petition similar hereto requesting the Commission to set the amount of damages which petitioner should pay to the County in the event the Federal Power Commission should grant petitioner's application for permission to construct its dam at the dam site to a level causing flooding of public roads, bridges and ferries of the County to an elevation of 793 feet, above mean sea level datum, as established by the United States Coast and Geodetic Survey, as revised in January 1955; and that the Commission by its order of June 3, 1969, placed such damages at $781,015.24, of which $260,338.44 has now been paid.

4. That petitioner has filed this its additional petition since the flood level of its proposed dam has been raised by two feet and since the costs have increased since 1969 with regard to remedial work necessary to be performed by the County to accommodate the public roads, bridges and ferries of the County to the flooding as will result from petitioner's proposed dam.

PREMISES CONSIDERED, the petitioner prays that the Court of County Commissioners, in accordance with the provisions of Alabama Code 1940, Title 10, Section 180, will now ascertain the present amount that petitioner will be required to pay under the terms of such statute for public roads, bridges and ferries flooded or intended to be flooded by petitioner when the water levels created by its proposed dam are raised to an elevation of 795 feet, above mean sea level datum, as established by the United States Coast and Geodetic Survey, as revised in January, 1955, but allowing credit against such sum of damages as presently ascertained the sum heretofore paid by petitioner, all to the end that petitioner may pay to such Court the full amount presently ascertained, such remaining amount to be paid at such times and in such installments as the Court may direct, and so that petitioner may thereby secure the right

as provided by law so to flood, injure or damage such roads, bridges and ferries; and for such other orders as may be proper.

This the 18th day of July, 1974.

ALABAMA POWER COMPANY

By /s/ ALAN R. BARTON

Its Sr. Vice President

## APPENDIX E

### Order of July 22, 1974, by Court of County Commissioners, Randolph County, Alabama

| | | |
|---|---|---|
| STATE OF ALABAMA | ) | BEFORE THE COURT OF |
| | ) | COUNTY COMMISSIONERS |
| RANDOLPH COUNTY | ) | OF RANDOLPH COUNTY, ALABAMA |

IN THE MATTER OF THE PETITION OF ALABAMA POWER COMPANY TO FLOOD CERTAIN ROADS, BRIDGES AND FERRIES IN RANDOLPH COUNTY

The petition of Alabama Power Company, petitioner, in the above matter, dated July 22nd, 1974, coming on to be heard by the Court of County Commissioners and the same having been fully considered and understood;

IT IS NOW, THEREFORE, RESOLVED, ORDERED AND ADJUDGED by the Court that the total sum of $1,056,015.24 be and is hereby presently fixed by the Court as the amount that petitioner shall pay under the terms of Alabama Code 1940, Title 10, Section 180, for the existing and proposed public roads, bridges and ferries flooded or intended to be flooded by petitioner in Randolph County, as set forth in such petition and for such other damage as will be done to such county by the raising of water by the proposed dam to an elevation of 795 feet, above mean sea level datum, as established by the United States Coast and Geodetic Survey, as revised in January, 1955, allowing full credit against such sum, however, for the $260,338.44 heretofore prepaid by petitioner to County as a portion of such damages, leaving $795,676.80 as the sum remaining.

IT IS FURTHER RESOLVED, ORDERED AND ADJUDGED by the Court that in order to assure that timely locating, laying out, and opening of public roads and bridges and ferries in lieu of those flooded, the petitioner shall contempo-

raneously with the signing of this order, pay the sum of $275,000.00 to this Court to be used for public roads, bridges and ferries in Randolph County; that not later than 30 days after actual physical construction work on the dam is started, petitioner shall make a payment of $260,338.40 to this Court for such use; and that not later than one year after the payment of such $260,338.40, petitioner shall make a final payment of $260,338.40 to this Court for such use.

And Alabama Power Company now agreeing before the Court to pay such sums in such manner, it is further RESOLVED, ORDERED AND ADJUDGED by this Court that Alabama Power Company be and is hereby granted the right and authority to flood, injure, damage or affect existing and proposed public roads, bridges and ferries in such county, as prayed for in such petition; and the Court here and now vests absolutely in Alabama Power Company the right to flood, injure, damage or affect those portions of the existing and proposed public roads, bridges and ferries in such county that will be covered with, as well as those that will be entirely surrounded by, the waters of the Tallapoosa River and its tributaries when such waters are raised to an elevation of 795 feet above mean sea level datum, as established by the United States Coast and Geodetic Survey, as adjusted in January, 1955, at the dam site in Randolph County (to-wit, approximately river mile 138).

This the 22nd day of July, 1974.

/s/ JAMES L. McMURRAY

Judge of Probate and ex officio
Chairman of the Court of
County Commissioners

/s/ FRED MCCAIN

/s/ GAY FOSTER

/s/ GUY HENDERSON

/s/ TED WARD

Members of Court of County Commissioners

## APPENDIX F

### Bill of Complaint by Randolph County

| | | |
|---|---|---|
| RANDOLPH COUNTY | ) | IN THE CIRCUIT |
| | ) | COURT OF RANDOLPH |
| PLAINTIFF | ) | COUNTY, ALABAMA |
| | ) | |
| VS. | ) | CASE NO. CV 81-063 |
| | ) | |
| ALABAMA POWER | ) | |
| COMPANY | ) | |
| | ) | |
| DEFENDANT | ) | |

BILL OF COMPLAINT

COUNT ONE

1. On or about July 22, 1974, plaintiff's predecessor, Court of Commissioners, entered into an agreement with Alabama Power Company that $1,056,015.24 was fixed by the Court of County Commissioners as the amount the defendant would pay plaintiff for certain roads and bridges located in Randolph County which would be flooded when the Tallapoosa River and its tributaries were raised to an elevation of 795 feet above mean sea level.

2. At the time said amount was fixed, the Court entered an order that provided that said amount was *"presently"* fixed as the amount the Count would be paid under then Code of Alabama 1940, Title 10, Section 180 (now Code of Alabama 1975, Section 10-4-320 (5). Said order by said Court of Commissioners was entered in response to a petition filed by the defendant, a copy of said petition and order being attached hereto and marked Exhibit "A" and Exhibit "B" respectively.

3. Since said order was entered, costs have greatly increased, inflation has increased and all building costs have greatly increased with respect to the roads and bridges referred to in the above petition.

4. Plaintiff would show that it was contemplated between the parties that the amount paid in 1974 would be adjusted in the future to cover these increases which have arisen.

5. Plaintiff would state that costs to open, lay-out and construct the roads and bridges referred to in the petition as well as other roads and bridges not referred to in the petition presently as many times more than that previously paid by the defendant to plaintiff.

6. Defendant owes plaintiff the additional cost necessary to open, lay-out and construct said additional roads and bridges pursuant to Code of Alabama 1940, Title 10, Section 180 (now Code of Alabama 1975, Section 10-4-320(5).

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT TWO

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff incorporates No. 2 of Count One as if fully set out herein.

3. Plaintiff would state that the order entered in July 22, 1974, by the Randolph County Court of Commissioners was void on its face to grant to defendant the relief sought under Code of Alabama 1940, Title 10, Section 180 which provides as follows:

> To acquire by condemnation the right to flood private roads and shall have the right to flood public roads by paying to the county commissions of counties in which public roads are the cost of locating, laying out and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded; but such corporation may appeal from the order of the county commission to the circuit court of the county within 30

> days after the making of such order, by filing with the judge of probate of the county a written notice of appeal, and on such appeal the trial shall be de novo. Upon the payment of such corporation to the county commission of the sum fixed by such commission, together with the costs of the proceeding pending such appeal, and upon the execution of a bond in double the amount of such damages or amount so fixed, with good and sufficient sureties to pay such damages as the county may sustain, the corporation shall be entitled to flood the roads which are made the object of the proceeding; but such right shall not vest absolutely in such corporation until the final determination of the case and the payment or deposit in court of such damages or compensation as shall be adjudged.

4. Plaintiff would state that the only means available to the defendant to acquire roads and bridges was by statute and the statute hereinabove referred to specifically provides the means by which defendant could acquire the rights sought was by condemnation.

5. The means by which defendant could acquire the rights sought by the petition are by condemnation as set out in Code of Alabama 1940, Title 10, Section 188 (now Code of Alabama 1975, Section 10-4-322).

6. Plaintiff would state that the pertinent Code section with respect to the means available to plaintiff to obtain property by a condemnation states as follows:

> The procedure for condemnation under this article shall be in the manner provided for the condemnation of lands and rights-of-way for public use in chapter 1 of Title 18 of this Code; or, at the option of the condemning party, in the manner provided in any other statute conferring the power of eminent domain on public utility corporations.

7. Plaintiff would further show that the procedure for condemnation of lands already devoted to public use as is provided for in the Code of Alabama 1940, Title 19, Section 9 (now Code of Alabama 1975, Section 18-1-6 which provides as follows:

> If the property sought to be condemned or any portion thereof or interest therein has already been subjected to or devoted to a public use, such land or portion thereof or interest therein shall not be taken for another and different character of public use unless an actual necessity for the specific land or portion thereof or interest therein shall be alleged and proven, and unless it be alleged and proven that such other and different character of public use will not materially interfere with the public use to which such property is already subjected or devoted; provided, however, that this section shall not apply to any crossing, at grade or otherwise, of the right-of-way of any railway company when such crossing is made by any state highway, county road or city street within counties having populations of not less than 34,875 nor more than 36,000, according to the most recent federal decennial census.

8. Plaintiff would show that no condemnation procedures have been held with respect to the roads and bridges plaintiff sought to acquire the right to flood and that the commission order heretofore entered is void as the plaintiff and defendant had no statutory right to enter into the agreements hereinabove referred to.

9. Plaintiff would show that defendant has no right to flood the roads and bridges which will be flooded as hereinabove described and will not have the right to so flood said roads and bridges until acquired in the means provided for by the Code of Alabama.

10. Plaintiff would state that it stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff to any amounts which plaintiff is awarded by proper condemnation procedures as may be determined by the procedures hereinabove outlined.

WHEREFORE, plaintiff prays that this Court will issue an order declaring that the order attached hereto as Exhibit "B" entered in 1974 is void to convey to defendant the right to flood public roads and bridges as outlined in said order and that the proper procedure for obtaining such right must be obtained by defendant by statutory provisions outlined above before defendant has any right to flood said roads and bridges.

## COUNT THREE

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff herein incorporates No. 2 of Count One as if fully set out herein.

3. At the time plaintiff and defendant were negotiating concerning the amount which defendant would be required to pay under Code of Alabama 1940, Title 10, Section 180, the defendant willfully represented to the plaintiff that only the present value of roads and bridges was required to be paid by defendant to the plaintiff as damages to plaintiff and that the defendant was not required to pay the cost of opening, laying out and constructing new roads to be opened in lieu of the roads and bridges flooded.

4. Such willful representations made by the defendant to plaintiff were false and defendant knew they were false and defendant made said representations with the intent that plaintiff would rely upon them.

5. Plaintiff relied on such representations of the defendant in entering the order attached hereto as Exhibit "B".

6. Plaintiff would state that in fact the defendant is required to pay the actual present cost of locating, laying out and opening other roads and bridges to replace those taken as outlined in the statutory procedures hereinabove referred to in Count Two.

7. Plaintiff would state that the actual construction cost to build said roads and bridges to replace those will be flooded by the defendant is in excess of $10,000,000.00.

8. Plaintiff stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff against the damages defendant owes plaintiff.

9. Plaintiff has only recently discovered the false statements made by defendant.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT FOUR

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff herein incorporates No. 1 of Count One as if fully set out.

2. Plaintiff herein incorporates No. 2 of Count One as if fully set out.

3. At the time plaintiff and defendant were negotiating in 1974 for the amount to be paid by the defendant to plaintiff under Code of Alabama 1940, Title 10, Section 180, the defendant misrepresented to plaintiff that it would only be required under the law to pay for the present value of existing roads and bridges and not for the cost to replace the roads and bridges intended to be flooded by defendant.

4. Plaintiff would show that such misrepresentation by defendant to plaintiff of a material fact critical to the negotiation and that such misrepresentations of such material facts were recklessly made without knowledge of the truth or falsity thereof by the defendant and with the intent to induce the plaintiff to act thereon and that the plaintiff did in fact upon such reckless misrepresentations hereinabove referred to to its injury.

5. Plaintiff would state that the defendant was in fact required to pay the actual cost of opening, laying out and constructing roads and bridges in lieu of those to be flooded under the procedures outlined in Count Two of this complaint.

6. Plaintiff would state that the actual cost to build roads and bridges flooded by defendant is in excess of $10,000,000.00.

7. Plaintiff stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff against the damages defendant owes plaintiff.

8. Plaintiff would show that the falsity of the statements

hereinabove referred to has only recently been learned by plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT FIVE

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff herein incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff herein incorporates No. 1 of Count One as if fully set out herein.

3. Plaintiff herein incorporates No. 3 of Count Four as if fully set out herein.

4. Plaintiff would state that the defendant innocently or by mistake represented the facts referred to in No. 3 above to the plaintiff and thereby induced the plaintiff to action in entering into the order attached hereto as Exhibit "B".

5. Plaintiff would state that the defendant was in fact required to pay the actual cost of opening, laying out and constructing roads and bridges in lieu of those to be flooded under the procedures outlined in Count Two of this complaint.

6. Plaintiff would state that the actual cost to build roads and bridges flooded by defendant is in excess of $10,000,000.00.

7. Plaintiff stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff against the damages defendant owes plaintiff.

8. Plaintiff would show that the falsity of the statements hereinabove referred to has only recently been learned by plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT SIX

Plaintiff claims of defendant the following relief in addition

to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff incorporates No. 2 of Count One as if fully set out herein.

3. Plaintiff herein incorporates No. 3 of Count Four as if fully set out herein.

4. Plaintiff would state that the defendant deceived the plaintiff by willfully representing to plaintiff the material facts referred to in No. 3 above as true which the defendant knew to be untrue or by reckless representation of said material facts referred to in No. 3 as true which defendant did not know to be false to induce the plaintiff to act and plaintiff did so act in entering the order attached hereto as Exhibit "B".

5. Plaintiff would state that the defendant was in fact required to pay the actual cost of opening, laying out and constructing roads and bridges in lieu of those to be flooded under the procedures outlined in Count Two of this complaint.

6. Plaintiff would state that the actual cost to build roads and bridges flooded by defendant is in excess of $10,000,000.00.

7. Plaintiff stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff against the damages defendant owes plaintiff.

8. Plaintiff would show that the falsity of the statements hereinabove referred to has only recently been learned by plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT SEVEN

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff herein incorporates No. 2 of Count One as if fully set out herein.

3. Plaintiff incorporates No. 3 of Count Four as if fully set out herein.

4. Plaintiff would state that the defendant withheld and/or concealed material facts as to the defendant's liability to plaintiff for flooding roads and bridges from the plaintiff and without plaintiff's knowledge of such material facts it entered into the order attached hereto as Exhibit "B" to its detriment.

5. Plaintiff would state that the defendant was in fact required to pay the actual cost of opening, laying out and constructing roads and bridges in lieu of those to be flooded under the procedures outlined in Count Two of this complaint.

6. Plaintiff would state that the actual cost to build roads and bridges flooded by defendant is in excess of $10,000,000.00.

7. Plaintiff stands ready, willing and able to apply any amounts heretofore paid by defendant to plaintiff against the damages defendant owes plaintiff.

8. Plaintiff would show that the falsity of the statements hereinabove referred to has only recently been learned by plaintiff.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT EIGHT

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff herein incorporates No. 1 of Count One as if fully set out.

2. Plaintiff would show that by mutual mistake of plaintiff and defendant, plaintiff established the damages which defendant would be required to pay under Code of Alabama 1940, Title 10, Section 180 for bridges and roads which will be flooded by defendant in constructing a reservoir in Randolph County, Alabama.

3. Plaintiff would state that it has just discovered that it was without authority to issue the order attached hereto as Exhibit "B" and that the only procedure by which defendant could have obtained the right to flood the roads and bridges sought to be taken by defendant was by condemnation as outlined in Code of Alabama 1940, Title 10, Section 180.

4. Plaintiff is without the money to construct roads and bridges sought to be flooded by defendant and has been informed that defendant intends to flood said roads and bridges in 1982.

5. Plaintiff stands ready, willing and able to credit any money heretofore paid by defendant to the amount of damages which may be determined by this Court pursuant to proper Code procedures.

WHEREFORE, plaintiff prays that this Court will direct defendant to institute condemnation procedures for the roads and bridges sought to be flooded in the Probate Court of Randolph County so plaintiff may proceed with the opening, laying out and constructing of additional roads and bridges to replace those taken after it receives proper amount of damages from defendant.

## COUNT NINE

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff incorporates No. 2 of Count One as if fully set out herein.

3. At the time plaintiff and defendant were negotiating in 1974 concerning the amount of money to be paid by defendant to plaintiff, the parties hereto were proceeding under the assumption that the dam would be completed and the reservoir flooded in the year 1978.

4. Plaintiff would state that the amount accepted by plain-

tiff from defendant in 1974 was based upon this fact and upon the further assumption that plaintiff would be receiving additional revenues from increased tax basis in the year 1978 to complete the construction of additional roads and bridges sought to be flooded.

5. Since said time for reasons unknown at the present time to plaintiff, defendant stopped construction on the project for in excess of one (1) year and had other numerous delays all of which are without the fault of plaintiff.

6. The additional revenues contemplated to be received by plaintiff have not been forth coming and plaintiff is without sufficient means to comply with Code of Alabama, Title 10, Section 180.

7. Plaintiff would state that the liability for additional cost of opening, laying out and constructing new roads and bridges has greatly increased and plaintiff has no funds to construct said roads and bridges.

8. Plaintiff would state that the burden of additional costs rest upon defendant.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost.

## COUNT TEN

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff incorporates No. 1 of Count One as if fully set out herein.

2. Plaintiff incorporates No. 2 of Count One as if fully set out herein.

3. Plaintiff would state that additional roads and bridges not contemplated to be flooded in 1974 are in fact being taken by defendant and defendant has not complied with proper procedures for condemnation of said additional roads and bridges not contemplated between the parties in 1974.

WHEREFORE, plaintiff demands judgment against defen-

dant for the sum of $10,000,000.00 plus interest and cost or in the alternative that defendant be required to condemn additional public roads and bridges which will be flooded by the reservoir.

COUNT ELEVEN

Plaintiff claims of defendant the following relief in addition to the relief hereinabove prayed for and/or in the alternative to the relief hereinabove prayed for:

1. Plaintiff is informed and upon such information and belief believes that defendant will flood certain public roads and bridges in this County in the year 1982.

2. Defendant has attempted to secure rights to flood said roads and bridges without due process of law.

3. Plaintiff would state that defendant's attempt to secure the right to flood roads and bridges located in Randolph County, Alabama, is in violation of the constitutional rights of the citizens of Randolph County and that the procedures heretofore relied upon by defendant to acquire said right is in violation of due process requirements of the Constitution of the United States of America.

4. Plaintiff stands ready, willing and able to credit any sums heretofore paid by defendant to plaintiff against damages which may be properly assessed once the due process requirements of the law have been complied with.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $10,000,000.00 plus interest and cost for roads and bridges taken in this County or for such amounts as may be determined by proper condemnation procedures in the Probate Court.

/s/ JOHN A. TINNEY

John A. Tinney
Attorney for Plaintiff
P. O. Box 1020
Roanoke, Alabama 36274

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY OF ALL ISSUES TRIALABLE OF RIGHT BY JURY.

/s/ JOHN A. TINNEY

John A. Tinney

## APPENDIX G

**Portions of Amendment to Complaint by Randolph County (Adding Claim Under 42 U.S.C. § 1983)**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|---|---|---|
| RANDOLPH COUNTY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION |
| | ) | NO. 81-119-E |
| ALABAMA POWER COMPANY, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

AMENDMENT TO COMPLAINT

AMENDMENT TO COUNT ELEVEN
(*Deprivation of Rights, Privileges* and *Immunities* Secured by the Constitution Of the United States *42 U.S.C. Section 1983*)

1. Plaintiff incorporates Count Eleven of the original complaint and adds paragraphs 1-43 above as if fully set out herein. The defendant also misrepresented to plaintiff as per the allegations set forth in Counts 3, 4, 5, 6, 7 in violation of plaintiff's rights under the Constitution of the United States, and in violation of 42 U.S.C. Sec. 1983. Defendant further violated plaintiff's rights as hereinafter described.

2. Plaintiff herein, Randolph County, by and through the Randolph County Commission for itself and on behalf of all citizens of Randolph County who are citizens of the United

States of America or otherwise entitled to the protection of its Constitution and Laws, brings this action as plaintiff.

3. At all times hereinafter defendant, APCO, an Alabama corporation, was engaged in the business of supplying power produced by water force to the residents and citizens of the State of Alabama, including, but not limited to citizens and residents of Randolph County, Alabama. It was a public utility and by Alabama Statute had and possessed the right of eminent domain. At all times from the mid 1960's until the wrong was discovered, defendant was acting under and by virtue of Title 10, Section 180, Code of Alabama (1940) which is now Section 10-4-320, Code of Alabama (1975) which gave said defendant the right "to acquire by condemnation the right to flood private roads and shall have the right to flood public roads by paying to the county commissioners of counties in which public roads are the cost of locating, laying out and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded . . ."

Through the use of this Statute, APCO duped the county officials. Also, and at said times, defendant, APCO, as its position relates to the citizens of Randolph County, Alabama and the United States of America was operating by means of said statutory authority through public officials of Randolph County, to-wit: The Probate Judges, the various commissioners, and various engineering personnel of said county. Said actions were under color of said State of Alabama statutory authority.

4. Tit. 42, U.S.C. Section 1983 provides in full "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress."

Said statute was the law over all of the time period in question in this lawsuit and is presently the law. Defendant, APCO,

has been at all times in question and is now very familiar with said statute.

5. Jurisdiction of this Court is invoked by Title 16, U.S.C. Section 814, granting the right to acquire property by eminent domain to Alabama Power Company.

6. The jurisdiction of this Court is further invoked under Title 28, U.S.C. Section 1331, and Title 28, U.S.C. Section 1343, in that the amount in controversy exceeds the amount of $10,000.00 exclusive of interest and cost, and arises under the Constitution and Laws of the United States.

7. Jurisdiction of this Court is further invoked under Title 28, U.S.C. Section 1337 in that the action arises out of the Federal Power Act which is an act of Congress regulating commerce.

8. Jurisdiction of this Court is further invoked under Title 42, U.S.C. Section 1983 to redress the deprivation of rights, privileges or immunities secured by the Constitution and law of the United States.

9. On or about June 3, 1969, and July 22, 1974, the Randolph County Commission entered into an agreement or arrangement with Alabama Power Company which ultimately resulted in the sum of $1,056,015.24 as being fixed as the amount which defendant would pay plaintiff for certain roads and bridges located in Randolph County, Alabama which was to be flooded when the Tallapoosa River and its tributaries were raised to an elevation of 793 or 795 feet respectively above mean sea level.

10. Defendant represented to plaintiff during negotiations prior to the signing of the agreements hereinabove referred to and during the interval of time from the mid 1960's to July, 1981, hereinabove referred to in this Amendment, that its responsibility to plaintiff would be to pay for "in place-in kind" valuation of the various roads and bridges which would be flooded in the County. Other representations of a willful, intentional, reckless, and mistaken nature were also made and deceit, fraudulent deceit, and suppression of material facts were also engaged in as previously specified throughout this Amend-

ment by means of previous counts. These are here incorporated by reference. Based upon these representations, the County entered into the above agreements, arrangements and orders referred to.

11. The proper measure of defendant's responsibility to plaintiff was established by Code of Alabama 1975, Section 10-4-320(5) which provided that the Alabama Power Company would be responsible to pay "the cost of locating, laying out and opening other public roads in lieu of and to the same extent as those flooded." This statute is grounded as it must be, on the right to due process of law and just compensation as guaranteed by the Constitutions, both State and Federal.

12. Plaintiff, for itself and on behalf of all of its citizens of Randolph County and the United States of America, was entitled to be paid just compensation by defendant for the roads and bridges to be flooded in Randolph County as protected under the Fifth and Fourteenth Amendments of the Constitution of the United States and the equivalent Sections of the Constitution of Alabama.

13. The actions of the defendant have resulted in the said citizens being deprived of the use of the certain roads and bridges in the County because of the fact that just compensation was not paid to plaintiff as provided by law and the same have not and cannot presently be replaced due to lack of funds.

14. Defendant herein at all times was acting under color of state statutes, ordinances, regulations, customs or usage of the laws of the State of Alabama.

15. Defendant's actions deprived plaintiff and the citizens whom it represents, of their rights, privileges and immunities secured by the Constitution and Laws of the United States and the State of Alabama, and were in direct violation of 42 U.S.C. Section 1983, causing the damages hereinafter alleged.

16. Defendant's acts were done intentionally, in bad faith, negligently, wantonly, recklessly, etc. to deprive plaintiff and did deprive plaintiff, for itself and on behalf of the citizens of Randolph County, of its rights protected by the Fifth and Fourteenth Amendments of the United States Constitution spe-

cifically and of other rights guaranteed by said constitutions in general and of other rights guaranteed by the laws of the United States of America.

17. As a direct and proximate consequence of the defendant's conduct as set forth above, plaintiff has suffered actual damages. These will be outlined in more detail hereinafter in this Amendment.

18. Plaintiff claims punitive damages for itself and on behalf of all citizens of Randolph County inasmuch as defendant's conduct was motivated by evil motive or intent *or* defendant's conduct was recklessly indifferent or callously indifferent to the Federally protected rights of plaintiff, Randolph County, and the citizens of that County who were and are citizens of the United States of America.

19. By reason of 42 U.S.C. Section 1988, plaintiff claims attorney fees and legal expenses as provided thereunder.

20. Plaintiff discovered this deprivation and invasion of its rights, privileges and unimmunities, secured by the Constitution and Laws of the United States and the State of Alabama in July, 1981.

Wherefore, plaintiff prays for damages against defendant for the sum of $10,000,000.00 in actual damages, and $15,000,000.00 in punitive damages, for attorney fees and legal expenses under the exception to the American Rule and as provided for under 42 U.S.C. Section 1988, and for such other, further and different relief to which the Court may deem just and proper in and about the pleadings and proof contained herein.

/s/ JAMES J. THOMPSON, JR.

James J. Thompson, Jr.
Hare, Wynn, Newell & Newton
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/s/ JOHN H. LAVETTE

2316 10th Avenue South
Birmingham, AL 35205
(205) 254-3019

*Attorneys for Plaintiff*

## APPENDIX H

**District Court's Order of January 25, 1983 Granting Partial Summary Judgment to Alabama Power Company**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|---|---|---|
| RANDOLPH COUNTY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION |
| | ) | NO. 81-119-E |
| ALABAMA POWER | ) | |
| COMPANY, | ) | |
| | ) | |
| Defendant. | ) | |

ORDER

The plaintiff Randolph County has filed this cause of action against the defendant Alabama Power Company (APCO) contending that the county is entitled to additional money from APCO for the construction of new roads and bridges to replace those roads and bridges flooded by the R. L. Harris Dam and Reservoir. This cause of action is now before the court on a motion for summary judgment filed by APCO. For reasons which follow, the court is of the opinion that the motion is due to be granted in part and denied in part.

I.

Between 1965 and 1969, the court of commissioners of Randolph County entered into negotiations with APCO for the payment of money by APCO to the county for certain roads and bridges which would be flooded when APCO raised the elevation of the Tallapoosa River and its tributaries. The

county and APCO agreed to a payment of $781,015.24 and on June 3, 1969, the commissioners executed an order confirming the payment amount. The order was drafted by the attorneys for APCO.

Later, APCO realized it was necessary to raise the elevation of the river and its tributaries still further, and in 1974, APCO and the commissioners again entered into negotiations to increase the amount agreed to in 1969. The commissioners and APCO agreéd to a new payment amount of $1,056,015.24, which was to be substituted for, not in addition to, the 1969 amount, and on July 22, 1974, the commissioners executed an order confirming the new payment amount. The order was again drafted by attorneys for APCO. By the end of 1977, APCO had paid the county the amount agreed to in 1974.

The county now advances several theories to support its claim that it is entitled to additional money from APCO. These theories are (1) that the 1974 order contemplated adjustment for inflation and increased building costs; (2) that the 1974 order is void because APCO failed to comply with procedures for condemnation; (3) that APCO engaged in deceit, fraud, misrepresentation, and concealment in securing the commissioners' approval of the 1974 order; (4) that the 1974 order resulted from the commissioners' innocent mistake or both parties' mutual mistake; and (5) that the rise in the elevation of t' e river and its tributaries will result in the flooding of additional roads and bridges, not contemplated in 1974 and for which the county has not been compensated.

## II.

The county's theory that the 1974 order contemplated adjustments for inflation and increased building costs is simply without merit. The 1974 order on its face is clear and unequivocal and simply does not support the interpretation the county would like to have this court give it. *Commercial Union Insurance Co. v. Rose's Stores,* 411 So.2d 122, 124 (Ala. 1982), *quoting from Michigan Mutual Liability Co. v. Carroll,* 123

So.2d 920, 924 (Ala. 1960) ("trial courts are not empowered to insert ambiguities 'by strained and twisted reasoning, into contracts where no ambiguities exist.' ") APCO's motion for summary judgment is due to be granted as to this theory.

The county's theory that APCO failed to comply with procedures for condemnation is also without merit. § 10-4-320 (5), Code of Alabama 1975, provides in pertinent part that entities such as APCO "shall have the right to flood public roads by paying to the county commissions of counties in which public roads are the cost of locating, laying out and opening other public roads in lieu of and to the extent as the public roads flooded or intended to be flooded." The county's contention that APCO was required to go through a "condemnation" procedure is not supported from the face of the statute. The statute does not condition APCO's right to flood already public roads on prior condemnation of those public roads by APCO. Therefore APCO's motion for summary judgment is due to be granted on this theory.

The county's theory that the 1974 order resulted from the county's innocent mistake or the parties' mutual mistake is also without merit. The 1974 order was executed on July 22, 1974; however, this cause of action was not filed until August 5, 1981. These claims are barred by the six-year statute of limitations, § 6-2-34 (4), Code of Alabama 1975, a defense raised by APCO. Therefore, APCO's motion for summary judgment is due to be granted as to this theory.

The county's theory that the rise in the elevation of the river and its tributaries will result in the flooding of additional roads and bridges not contemplated in 1974 and for which the county has not received compensation is also without merit. There is no evidence before the court to support this theory. Therefore, APCO's motion for summary judgment is due to be granted as to this theory.

However, the issues regarding the county's theory that APCO engaged in deceit, fraud, misrepresentation, and concealment may not be resolved on the present record. The court is of the opinion that there is enough evidence before the court to sup-

port this contention; and, furthermore, the court is of the opinion that the question of whether the county discovered or should have discovered the alleged fraud more than one-year prior to the filing of this lawsuit, § 6-2-3, Code of Alabama 1975, raises issues of fact not properly resolvable on the present record.[1] *Mason v. Adams Realty, Inc.*, 556 F.2d 288, 295 (1977); *Sims v. Lewis*, 374 So.2d 298 (Ala. 1979). APCO's motion for summary judgment is therefore due to be denied as to this theory.

Accordingly, for the above reasons, it is ORDERED (1) that the defendant Alabama Power Company's motion for summary judgment be and it is hereby granted to the extent (i) that the plaintiff Randolph County contends that the 1974 order contemplated adjustments for inflation and increased building costs, (ii) that the plaintiff contends that the 1974 order is void because the defendant failed to comply with condemnation procedures, (iii) that the plaintiff contends that the 1974 order resulted from the commissioners' innocent mistake or the parties' mutual mistake, and (iv) that the plaintiff contends that the rise in the elevation of the Tallapoosa River and tributaries will result in the flooding of additional roads and bridges, not contemplated in 1974 and for which the county has not been compensated; and (2) that the motion be and it is hereby denied in all other respects.[2]

Furthermore, upon consideration of the plaintiff Randolph County's motion for summary judgment, it is ORDERED that the motion be and it is hereby denied.

Finally, for good cause, it is ORDERED that the January 22 and February 5, 1982, deadlines in the November 4, 1981, scheduling order be and they are hereby extended to April 1 and 15, 1983, respectively.

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[1]The attention of the plaintiff's attorney -- who has submitted an affidavit regarding disputed issues of fact -- is directed to the legal cannon which prohibits attorneys from testifying at trial to disputed issues of fact in proceedings in which they are counsel.

[2]The court reserves ruling at this time on whether the plaintiff has standing under 42 U.S.C.A. § 1983.

Done, this the 25th day of January, 1983.

/s/ MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

## APPENDIX I

### Portions of District Court's Order of November 10, 1983 Granting APCo Motion for Summary Judgment on § 1983 Count

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|---|---|---|
| RANDOLPH COUNTY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION |
| | ) | NO. 81-119-E |
| ALABAMA POWER COMPANY, | ) | |
| | ) | |
| Defendant. | ) | |

This cause is now before the court on defendant Alabama Power Company's September 12, 1983, motion for summary judgment. For the reasons stated below, the court concludes that the motion is due to be granted in part and denied in part.

I.

This lawsuit grows out of the construction of the R. L. Harris Dam and Reservoir on the Tallapoosa River in Randolph County, Alabama by Alabama Power Company (APCO). Construction of this reservoir required the flooding of certain roads and bridges in the Crooked Creek watershed area in Randolph County. Under Alabama law a water power company may flood public roads and bridges if it pays the court of county commissioners of the affected county "the cost of locating, laying out, and opening other public roads in lieu of and to the same extent as the public roads flooded or intended to be flooded." Ala. Code § 10-4-320(5) (1975). In 1965, APCO entered into negotiations with officials of Randolph County,

Alabama to fix the amount of compensation the power company owed the county pursuant to state law. In June 1969, the Randolph County Court of County Commissioners issued an order setting the company's compensation liability at $781,015.24. In 1974, it became apparent that APCO would have to raise the level of the reservoir an additional two feet in order to meet federal licensing requirements. Upon the power company's petition, the amount owed was recalculated at $1,056,015.24 to account for the additional flooding. By the end of 1977, APCO had paid the county the amount agreed to in 1974.

The county has brought this action alleging essentially that APCO fraudulently induced the county to set the amount of compensation owed by the power company for the flooded roads and bridges at a sum significantly lower than that mandated by Alabama law. The county alleges, among other things, that during the negotiation process the APCO failed to disclose the proper measure of value for the flooded facilities, misrepresented the legal standard for valuing the flooded facilities, misrepresented its duties under the statute, misrepresented its willingness to relocate the project, and misrepresented the period of time available in which the county could reach a decision on the amount of compensation owed. The county has brought this action under 42 U.S.C.A. § 1983 alleging that APCO, through its fraud, took property of the county and its citizens without just compensation as required by the fifth and fourteenth amendments to the U. S. Constitution, and the Federal Power Act, 16 U.S.C.A. §§ 791a-828c. Invoking this court's pendent jurisdiction, the county has also alleged state causes of action for deceit, suppression of material facts, and wilful and negligent misrepresentation, has moved for summary judgment on all claims.

II.

Summary judgment is only appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(c). The evidence presented to the court through affidavits and deposition testimony reveals genuine issues of fact concerning the representations APCO allegedly made and whether those representations were relied upon by the county. Leaving contentions as to these factual issues aside, the power company maintains that the county's claims must fail as a matter of law.

A. Claim Under Section 1983

As already noted, the county's section 1983 claim is that APCO by its fraud, took roads and bridges belonging to the county and its citizens without paying just compensation in violation of the fifth and fourteenth amendments to the U. S. Constitution. Two elements are necessary to a cause of action under section 1983: (1) that the conduct complained of was committed by one acting under color of state law; and (2) that the conduct complained of deprived a person of rights secured by the United States Constitution or federal statute. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir. 1983). The court assumes without deciding that the Alabama statute, quoted above, suffices to place the power company's actions under color of state law. The issue then becomes whether the county has any federally protected right against state action that takes public property without paying compensation to the county. It does not. A county is purely a creature of a state and, as such, is subject to the authority of the state unbridled by the U. S. Constitution.

In *Hunter v. City of Pittsburgh,* 207 U.S. 161, 28 S.Ct. 40 (1907), the Supreme Court rejected a constitutional challenge brought by the City of Allegheny, Pennsylvania to its annexation into the City of Pittsburgh under a Pennsylvania law which allowed such annexations upon a majority vote of the citizens of the affected cities, regardless of the vote in the city to be annexed. The Court stated that:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The state, therefore, at its pleasure, may

> modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its actions to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

207 U.S. at 178-79, 28 S.Ct. at 46. *See also Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S.Ct. 431 (1933). A county in Alabama enjoys no status superior to that attributed to a municipal corporation in *Hunter. See Alexander v. State ex rel Carver,* 150 So.2d 204, 206 (Ala.1963). Similarly, the former Fifth Circuit has stated that

> it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as corporations or individuals. . . . . Such entities are creatures of the state and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

*City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir. 1976) (citations omitted).

The specific question of whether the parent state may take property from one of its political subdivisions has apparently not been addressed in this circuit. This question was addressed by the Seventh Circuit in *Commissioners of Highways v. United States,* 653 F.2d 292 (7th Cir. 1981). In this case the United States had condemned property belonging to several Illinois towns to build a canal. A condemnation decree was entered imposing the duty to maintain bridges over the canal as compensation for the taking. The State of Illinois later assumed all obligations of the United States concerning the canal. The court stated that the towns had no action against the state to enforce the condemnation decrees because the state could have taken the property originally without paying compensa-

tion: "Nothing in the United States Constitution prohibits the State from taking its creatures property without providing compensation." 653 F.2d at 297. *See also City of Boston v. Massachusetts Port Authority,* 444 F.2d 167 (1st Cir. 1971) (city has no constitutional right to compensation against state agency operating airport for inverse condemnation of city school due to aircraft overflight); *Jefferson Township v. City of West Carrolton,* 517 F.Supp. 417 (S.D. Ohio 1981).

The county's reliance on *Oklahoma v. Atchison Co.,* 313 U.S. 508, 61 S.Ct. 1050 (1940); *City of Davenport v. Three-fifths Acres,* 252 F.2d 354 (7th Cir. 1958); and, *Wayne County, Kentucky v. United States,* 53 Ct. Cl. 417 (1917), *aff'd,* 232 U.S. 574, 40 S.Ct. 394 (1919), is misplaced. These cases stand for the proposition that compensation is required when the federal government takes public property from a state or state subdivision. They say nothing about the relationship between a state and its own political subdivisions.

Moreover, in instances where county and state interests are at odds, the county cannot stand as *parens patriae* to assert any federal constitutional right. After all, the county citizens are also citizens of the parent state. *See City of Safety Harbor v. Birchfield,* 529 F.2d at 1256 n.7.

The county also seeks to establish a section 1983 protected right to compensation under the Federal Power Act, 16 U.S.C.A. §§ 791a-828c. The act makes utilities holding licenses from the Federal Power Commission "liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . . constructed under the license." 16 U.S.C.A. § 803(c). This provision has been construed as establishing merely that the operation of the act does extend to the extinguishment of state law property rights without remuneration — that is, the act does not excuse a federal licensee from paying compensation for damages that their projects inflict on property interests recognized under state law. *Henry Ford & Son v. Little Falls Fibre Co.,* 280 U.S. 369, 50 S.Ct. 140 (1930). The Federal Power Act does not create or confer any substantive rights under section 1983 be-

tween a county and its state. The act does not abrogate the well-established principle that a county does not have any federal constitutional rights which may be invoked against the parent state.

* * * * * *

Accordingly, for the reasons stated above, it is hereby ORDERED:

(1) That the motion for summary judgment filed by defendant Alabama Power Company be and it is hereby granted as to the claims advanced by plaintiff Randolph County, Alabama under 42 U.S.C.A. § 1983; and

(2) That said motion be and it is hereby denied in all other respects.

DONE, this the 10th day of November, 1983.

/s/ MYRON H. THOMPSON

United States District Judge

## APPENDIX J

### District Court Order of March 1, 1984, Amending Order Concerning § 1983 Count

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

| | | |
|---|---|---|
| RANDOLPH COUNTY, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION |
| | ) | NO. 81-119-E |
| ALABAMA POWER COMPANY, | ) | |
| | ) | |
| Defendant. | ) | |

ORDER

Upon consideration of the defendant's December 30, 1983, motion to abstain and to certify questions of law to the Alabama Supreme Court and motion for reconsideration, it is ORDERED that the motions be and they are hereby denied.

Furthermore and for good cause, it is ORDERED that the November 10, 1983, order of the court, the second paragraph on page three, be and it is hereby amended to read as follows:

A. Claim Under Section 1983

> As already noted, the county's section 1983 claim is that APCO, by its froud, took roads and bridges belonging to the county and its citizens without paying just compensation in violation of the fifth and fourteenth amendments to the U. S. Constitution. Two elements are necessary to a cause of action under section 1983: (1) that the conduct complained of deprived a person of rights secured by the United States Constitution or federal statute; and (2) that said conduct was committed by one acting "under color of

state law." *Lugar v. Edmondson Oil Co., Inc.*, ____ U.S. ____, ____, 102 S.Ct. 2744, 2750-51 (1982); *Morrison v. Washington County, Alabama*, 700 F.2d 678, 682 (11th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 195 (1983). The right asserted to establish the first element is the due process clause. Because the due process clause protects individuals only from governmental and not from private action, the county has to demonstrate that the conduct complained of was achieved by "state action." *Lugar v. Edmonson Oil Co., Inc.*, ____ U.S. at ____, 102 S.Ct. at 2750. The court assumes without deciding that APCO's conduct constituted state action. The issue then becomes whether the county has any federally protected right against state action that takes public property from the county without paying compensation. It does not. A county is purely a creature of its state and, as such, is generally subject to the authority of the state unbridled by the U. S. constitution.

DONE, this the 1st day of March, 1984.

/s/ MYRON H. THOMPSON

United States District Judge